Separate Statement of Hon. Jay D. Blitzman

During the debate concerning the propriety of expanding the scope of permissible judicial comment pursuant to Canon 3B(9) the Judge Brandeis observation that sunlight is the best of disinfectants has been invoked.[1] I agree that the public is entitled to greater transparency regarding judicial proceedings, but this is only the starting point. The discussion entails balancing or reconciling the public's right to know and the independence of the judiciary. I am writing a separate statement because I believe that while greater discretion should be afforded judges in explaining decisions, I do not believe that this discretion should be unfettered. My primary concern is that the interest of the parties in understanding the reasons for a decision when it is made has not been given sufficient attention.

"At Long Last, Let The Judges Speak," the provocative Massachusetts Lawyers Weekly editorial of February 4, 2008 observed in its opening salvo: "Memo to the Supreme Judicial Court: end the gag order." The Committee has adopted the recommendation that judges should be permitted to file supplemental memoranda concerning pending cases after decisions have been made "at any time." The caveat to the new rule is that the subsequent opinion reflect the rationale for the decision at the time it was made. Such comment would be part of the record as it would be performed in the context of the performance of the judicial role and would not be considered as public comment.

While I agree with the creation of this option, I believe that it should be used sparingly. There is a need for further clarification in the rule or commentary regarding the parameters of such action. Judges should be circumspect about when, and if, it is appropriate to file supplemental memoranda. It is my recommendation that whenever "practicable", judges should be encouraged to articulate, either in writing or orally, their reasons for decisions at the time they are made. Educating the public serves to enhance confidence in the judiciary but so does informing the public and litigants of the reasons for decisions when they are made. My thinking on this subject has been informed by Cynthia Gray's letter to the editor that was published in the Boston Globe on February 11, 2008. This letter has been extensively quoted by Professor Andrew Kaufman in his separate opinion, but I feel compelled to cite the same language:

"...the credibility of the courts does not depend on judges responding to demands for explanations for unpopular decisions. Judges can and do explain their decisions-on the record, in writing, or orally with all parties present-to fulfill their primary responsibility to the litigants in a case. To educate the public, a judge may then respond to criticism by reiterating without elaboration what is set forth in the public record. By refraining from other public comment, judges assure the public that their cases will be tried, not in the press, but in the public forum devoted to that purpose.

Judges decide hundreds of issues in hundreds of cases every year. Any explanation for one of those decisions, months later in response to criticism, could not be reasonably be seen as reflecting the decision-making process at the time and would no doubt be further attacked as self-serving, and unsatisfactory..."

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[1] "Sunlight is said to be the best of disinfectants; electric lights the most efficient policeman"; L. Brandeis, "Other People's Money" p. 62, National Home Libe. Found. (Ed. 1943)

I have struggled with the proposition that a supplemental memorandum filed at any time, long after a judge may have had any involvement in the case, should be deemed to be record comment within the parameters of judicial duties, while public comment is limited to what can be gleaned from the record at the time an order was entered. A reporter writes an article concerning a decision that I believe is profoundly inaccurate and inflammatory. The judge would be able to respond with a memorandum that, relying on the information known at the time of the decision, more fully explains the rationale for the decision. I share the concern of Ms. Gray and Professor Kaufman, that the further removed in time from the decision that a supplemental memorandum is written the greater the danger that the enterprise might be perceived as after the fact rationalization. I am not impugning or raising questions about any jurist's intellectual integrity. Despite the best of intentions the ability to fairly re-construct one's thought process as time passes is inevitably compromised. Given advances in technology these opinions would be disseminated instantaneously to the public and the litigants. It could be argued that they would be *de facto* facto press releases. There is a danger of creating a culture in which responses might be expected by the print and electronic media. The Memorandum of Observations notes that this new rule would be permissive but do we want to engender a climate in which a judge who chooses not to respond would be singled out? Professor Kaufman quotes the Memorandum of Observations : "Judges traditionally speak from the bench and through their memoranda," but he cautions that "...judges traditionally do so when they render decisions and not long afterwards, in response to public criticism, while the case is pending." Such action might serve the unintended goal of further fueling the controversy and in some instances might occasion motions by litigants for re-hearing of adverse rulings as the court's thought process is revealed. Supplemental memoranda may indeed serve to educate the public; it is as likely that they will be de-constructed to further skewer their authors.

In spite of my concerns about the ability to file a supplemental memorandum "at any time," I cannot specify a prescribed time limit, as has Professor Kaufman. There may be occasions in which a judge writes an opinion *sua sponte* to augment the record, but in practice this issue does not usually arise unless there is a controversy over subsequent events. One alternative would be to limit the option to the period of time in which a judge had the opportunity to enter orders in a case. This would arguably be more consistent with the concept of acting within the judicial role, but would not cover the types of cases that often result in after the fact firestorms, e.g. bail and restraining order decisions entered in the hurly burly of busy courts. Professor Kaufman's "dissent" would preclude subsequent opinions in response to media, political, and other public criticism. While I agree with much of his statement, I am not prepared to go as far, as I believe that there will be circumstances in which a judge may feel compelled to act and may feel that existing means of response are inadequate. As I believe that these circumstances are the exception and not the rule, I think that this subject requires further clarification in the proposed revisions.

I am not suggesting that judges be compelled to make their findings known at the time a decision is entered but I believe the practice should be encouraged. The most persuasive argument for permitting judges to write supplemental memoranda is that there are circumstances in which a judge, given the press of business, believes that he/she does not have an adequate opportunity to fully state the reasons for a decision when it is made. In busy courts, for example, a judge may conduct a large number of arraignments and may feel that he/she can do little more than fill out the statement of reasons with its perfunctory check list when setting bail. The

culture in such circumstances is not to write, or articulate at any length the reasons for a decision unless the judge perceives there is a reason to do so. As already noted, this does not occur until later. A judge may set bail in ninety-nine cases without reaction. In case number one hundred a person who is released, or posts what will be later perceived as a low cash bail, is accused months later of committing a heinous act. The ensuing outcry then includes a public demand to have the judge explain or justify the decision that led to the defendant's release. To date the ability of a judge to respond has been limited to respond, either through a third party, or directly, with a reiteration of only what was stated on the record at the time the decision was made or a clarification of court procedure. I can envision circumstances in which a judge may sincerely believe that the discourse has become so misleading that there is a need to explain the reasons for the decision in greater detail. A judge may also believe that an issue is so important that he/she write further on the subject to educate the litigants and the public. However circumscribed, judges retain first amendment rights.

The aberrational cases, however, should not be the occasion to create a carte blanche rule that allows judges to file supplemental memoranda at any time without any limitation, unless there was not a realistic opportunity to state the reasons for a decision when it was entered. In most instances judges have the opportunity to state the reasons for their decisions when they are made. Judges may not always have the time to craft written findings but it is not too onerous for the parties and the public to expect an oral statement explaining the reasons for a decision. This would not preclude a judge from indicating that he/she intends to enter more detailed written findings at a later date. I am not suggesting that judges be encouraged to engage in long-winded oratory regarding each case they hear; a concise statement outlining the reasons for a decision when it is made would suffice.

It has been argued that less is sometimes best. In the case of restraining order requests, for example, it has been suggested that it may be prudent to listen and rule without explicitly making finding regarding witness credibility as to do might inflame potentially volatile cases. A judge may be wary about overt comment at the time of a decision, but, I think it is much worse to do in response to criticism much later. There are problems that are inherent with after the fact revelation. However honest the judge may be, the litigant may feel victimized by a judge acting in self defense. Lack of credibility as a reason works, if it is to work at all, at the moment of decision. It is a most suspect explanation later in the process and may inflame the situation that the judge intended to mollify.

In recommending that judges should be able to write supplemental memoranda but **should** (emphasis added) make their reasons known at the time a decision is made when "practicable" I realize that I do not think I am opening a pandora's box. The slippery slope of allowing for unbridled discretion to file a supplemental memorandum at any time may be prove to be more difficult terrain to navigate. The Random House Dictionary (2d Ed) defines "practicable" as "1.capable of being done; effected, or put into practice with available means; feasible: a practical solution." I have cited the example of setting bail but can not be inclusive. Judges need not be concerned about having insufficient guidance. The Preamble to Rule 3:09 states that "When "should" or "should not" is used (in Commentary) the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined." Judges will approach this endeavor, as all others, with common sense and integrity. The thoughtful Memorandum of Observation states that "that the question of whether it is wise to issue a supplemental memorandum to explain a criticized ruling

is now left to the judge's sound discretion, not an ethical rule." Given the gravity of the decision I submit that more is required.

If a judge chooses to write a "second chance" memorandum he/she should be mindful of Canon 2 issues that include concerns about accurately characterizing what transpired and the appearance of impropriety. Articulating the reasons for decisions at the time they are made will serve to cast sunlight on the issues for the benefit of the public and the litigants. Sunlight in this context would indeed be the best of disinfectants.